Thong Kim Chea v Thong Seng & Co Sdn Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N–08–326–95
NH CHAN, MAHADEV SHANKAR AND VC GEORGE JJCA
10 JULY AND 28 AUGUST 1995

Civil Procedure *— Appeal — Leave to appeal — Application for leave made out of time — Whether must make formal application for extension of time — No explanation for delay — Absence of merits of case*

Civil Procedure *— Pleadings — Amendment — Further and better particulars of defence and counterclaim — Whether leave can be allowed if amendment would deprive other party of defence of limitation — Whether parties should be allowed to put pleadings in proper order*

The applicant held a position of trust in the first respondent company ('the company') in December 1991, when it was alleged that he had been misappropriating the company's funds. The respondents also alleged that on 18 December 1991, the applicant had agreed to transfer his property, No 41 Jalan Besar, Bahau ('the property') to the company in consideration for the missing amount being written off. However, the transfer of the property could not be registered as the applicant had entered a caveat over the property. The respondents filed a motion for the removal of the caveat. The applicant then filed a writ in the High Court alleging that the transfer was executed under duress and should be set aside. The respondents filed a defence and counterclaim, and prayed for a declaration that the transfer was valid, that the caveat be cancelled and alternatively for the moneys owed with interest. The applicant then applied for further and better particulars of the respondents' claim. The respondents supplied one and then another set of the particulars requested and subsequently applied to amend the second set by including unauthorized transactions made by the applicant in 1986 and 1987. The registrar gave leave to the respondants to amend and the applicant appealed to the judge in chambers. The appeal was dismissed on 28 April 1995. On 8 June 1995, the applicant applied for leave to appeal to the Court of Appeal.

Held, dismissing the application:

(1) An application for leave to appeal to the Court of Appeal must be made within one month from the date of judgment of the High Court. Here, the application was filed after the period of one month and no formal application for extension of time was made. There was no explanation for the delay and the failure to apply for an extension of time. Further, there was an absence of merits on the facts of the case.

(2) The applicant's counsel submitted that the leave to amend should have never been granted as it would deprive him of the defence of limitation. However, the proper place to plead this is at the trial of action provided that it was properly pleaded. Also, a breach of trust has been implied, which means that there is no limitation here. Further, the substantial cause of action of the respondants was to enforce the transfer made in 1991.

(3) The order sought to be appealed against was purely interlocutory meaning that the parties were completely at liberty to put their pleadings in proper order and to ventilate the issue as to whether the counterclaim was time-barred at the trial of action.

[Bahasa Malaysia summary

Pemohon menyandang suatu jawatan beramanah di dalam syarikat penentang pertama ('syarikat itu') pada Disember 1991, apabila dikatakan bahawa beliau telah menyalahgunakan wang syarikat itu. Penentang juga mengata bahawa pada 18 Disember 1991, pemohon telah bersetuju untuk memindahmilik hartanya, No 41 Jalan Besar, Bahau ('hartanah itu') kepada syarikat itu sebagai balasan supaya jumlah yang hilang itu dihapus kira. Bagaimanapun, pindahmilik hartanah itu tidak dapat didaftarkan kerana pemohon telah memfailkan suatu kaveat ke atas hartanah itu. Penentang telah memfailkan usul untuk membatalkan kaveat itu. Pemohon kemudiannya memfailkan writ di Mahkamah Tinggi dan mengatakan bahawa pindahmilik itu dilakukan akibat dures dan patut diketepikan. Penentang terus memfailkan pembelaan dan tuntutan balas, dan memohon deklarasi bahawa pindahmilik itu sah, kaveat itu dibatalkan dan secara alternatifnya untuk wang yang dihutang oleh pemohon bersama faedahnya. Pemohon telah memohon untuk butir lanjut dan jelas tentang tuntutan penentang. Penentang telah membekalkan satu set butir dan kemudiannya satu lagi set butir yang dipohon itu dan kemudiannya memohon untuk meminda set kedua itu dengan menyertakan transaksi tanpa kebenaran yang dibuat oleh pemohon pada tahun 1986 dan 1987. Pendaftar telah memberi kebenaran kepada penentang untuk membuat pindaan itu dan pemohon telah merayu kepada hakim dalam kamar. Rayuan itu telah ditolak pada 28 April 1995. Pada 8 Jun 1995, pemohon telah memohon kebenaran untuk membuat rayuan ke Mahkamah Rayuan.

Diputuskan, menolak permohonan itu:

(1) Sesuatu permohonan untuk kebenaran membuat rayuan ke Mahkamah Rayuan mesti dibuat dalam masa satu bulan dari tarikh penghakiman Mahkamah Tinggi. Di sini permohonan difailkan selepas tempoh sebulan dan tiada permohonan formal dibuat untuk perlanjutan masa. Tidak ada penjelasan untuk kelengahan itu dan kegagalan untuk memohon untuk perlanjutan masa. Juga, tidak terdapat merit di atas fakta kes ini.

(2) Peguambela pemohon berhujah bahawa kebenaran untuk meminda tidak sepatutnya diberikan kerana ini akan melucutkan pembelaan pengehadan. Walau bagaimanapun, tempat yang betul untuk menimbulkan pli ini adalah pada perbicaraan tindakan atas syarat ia dinyatakan di dalam pliding dengan betul. Juga, ini adalah kes di mana pecah amanah dikatakan secara tersirat, yang bermakna tiada pengehadan di sini. Lebih-lebih lagi, kausa tindakan utama penentang adalah untuk menguatkuasakan pindahmilik yang dibuat pada tahun 1991.

(3) Perintah terhadap mana rayuan dibuat adalah semata-matanya suatu perintah interlokutori, yang bermakna pihak-pihak berkenaan mempunyai kebebasan untuk menyempurnakan pliding mereka dan menyuarakan isu sama ada tuntutan balas dihalang oleh had masa di perbicaraan tindakan.]

Notes

For cases on leave to appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 478–508.

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506–2772.

Appeal from: Civil Suit No 22–174–1992 (High Court, Seremban)

AKJ D'Cruz (*AKJ D'Cruz & Co*) for the appellant.
Deborah Kaur (*Sri Ram & Co*) for the respondent.

Cur Adv Vult

10 July 1995

NH Chan JCA: This was a motion by the plaintiff [applicant] for leave to appeal to the Court of Appeal against the decision of the High Court dismissing the plaintiff's appeal from the registrar's order which allowed the defendants [respondents] to amend the further and better particulars of their defence. The High Court dismissed the plaintiffs' appeal on 28 April 1995. On 8 June 1995, the present motion was filed outside the period allowed for the appeal and there was no application for enlargement of time, therefore, we dismissed the motion for leave with costs to the respondents.

10 July 1995

Mahadev Shankar JCA: We dismissed this application for leave to appeal. Our reasons now follow. The applicant is hereafter referred to as the plaintiff and the respondents as the defendants.

On 3 June 1994, the registrar gave leave to the defendants to amend a pleading by way of further and better particulars of the defence and counterclaim. The plaintiff's appeal against the registrar's decision was dismissed by the judge on 28 April 1995. Desiring to appeal to this court, the plaintiff applied for leave. A

The rules require that this application for leave should have been filed before 28 May 1995. However, it was only filed on 8 June 1995. The solicitors for both parties were so informed by a letter of the registrar dated 12 June 1995. The defendants' solicitors gave notice they would object to the application being proceeded with. B

When the matter came before us on 10 July 1995, no formal application for an extension of time had been filed timeously or at all. C

The plaintiff's counsel then submitted that the plaintiff had affirmed an affidavit dated 7 July 1995 and sought to read it in support of his application. It is not clear if and when this affidavit was filed or served because it was not before us when the hearing commenced.

The plaintiff's solicitor claimed that he had prepared the notice of motion on 25 May 1995 and handed it together with the supporting documents to a courier. Why that courier could not file the documents until 8 June 1995 was not explained. Nor was it explained why no previous application had been timeously filed for an extension of time. D

The other circumstances relevant to our dismissal go to the absence of merits. The plaintiff's statement of claim and his reply and defence to the counterclaim were not included in the record. However, from the other papers it is apparent that the plaintiff was holding a position of trust in the first defendant company ('the company') since he was authorized to draw cheques on the company's account. On 17 December 1991, there was an extraordinary meeting of the company in which the other directors and shareholders of the company confronted the plaintiff with an allegation that the plaintiff had drawn cash cheques to the amount of RM305,000 without proper authority resulting in defalcation of a very large amount of the company's funds. The defendants said that because the plaintiff could not account for the cash in hand which was missing, the parties came to an agreement whereby the plaintiff agreed to transfer his property, No 41 Jalan Besar, Bahau to the company in consideration for the amount that was missing being written off. E F G

The transfer of this property was prepared and executed the following day in the office of Lee Boon Peng & Co, a firm of solicitors in Seremban and the title deed was handed over. But when the defendants went to register the transfer they found that the plaintiff had filed a caveat. They therefore filed a motion No 24–411–92 in the High Court for the removal of the caveat. H

The plaintiff, on the other hand, filed a writ in this matter in the High Court on 8 December 1992. He alleged that the transfer was executed under duress and should be set aside. On 4 January 1992, the defendants filed a defence and counterclaim, stating that the consideration for the I

transfer was a shortfall of *about* RM204,944.53 in the company's account and that the transfer was voluntarily executed. The defendants prayed for a declaration that the transfer was valid, that the caveat be cancelled and alternatively, for the money owed by the plaintiff with interest.

The plaintiff applied for further and better particulars of how the sum of RM204,944.53 was arrived at, which the defendants supplied on 7 April 1993. In it the defendants stated that these were the best particulars they could currently supply without prejudice to their right to supply further particulars should they become available thereafter. In summary, these particulars averred that the RM204,944.53 reflected the amount stated in the first defendant's cash book after a physical cash count on 17 December 1991. The defendants stated that they had since further found other unauthorized transactions which they would disclose at the trial.

The plaintiff was not satisfied with these particulars and applied to court for further particulars. The registrar made an order accordingly and on 29 April 1993, the defendants supplied a second set of particulars. In it once again the defendants reserved their rights to provide further particulars as and when they become available and stated that there was a running account from 1982 to 1985 between the parties and the amount returned by the plaintiff towards the running account left a total of RM204,944.53 unaccounted for.

The plaintiff was still not satisfied and applied to strike out if the particulars he requested were not supplied and on 17 June 1993, the defendants filed a third set of particulars. In this, they set out the total amount drawn by the plaintiff for each of the years 1982, 1983, 1984 and 1985 amounting to RM416,100. Thereafter on 29 June 1993, the plaintiff filed his reply and defence to the counterclaim. This document is not before us.

On 28 August 1993, the defendants applied to amend their earlier particulars, supported by an affidavit stating that from further documents examined, the defendants' accountants had established that in the running account between the parties from 1982 to 1987, the plaintiff had taken out the sum earlier indicated and in addition an amount of RM72,900 in 1986 and RM114,200 in 1987, making the total amount withdrawn as at the end of 1987 RM603,200. The amendment prayed for was to the particulars supplied on 29 April 1993 by the inclusion of the withdrawals for 1986 and 1987.

The plaintiff's solicitor has not diclosed whether any affidavit was filed in opposition to this application. He says that the application was objected to but the notes of evidence of the proceedings before the registrar or the judge are not before us. We do not know what he pleaded in this reply and defence to the counterclaim. The pitch of his somewhat importunate submission was that this leave to amend should never have been granted because it would have the effect of depriving him of the defence of limitation. This submission is predicated upon the contention that the defendants' cause of action arose between 1982 and 1985 and

therefore, the counterclaim being more than six years old, cannot be maintained. Provided he had properly pleaded this, the proper place for the plaintiff to establish such a contention was at the trial of the action.

What was plain and obvious from the defence and counterclaim and from the particulars supplied was that this was not a claim for a simple contractual debt. From the perspective of the defendants, here was a case where a breach of trust has been implied for which there is no limitation and also a defalcation which appears only to have come to light in 1991. In any event, the substantial cause of action of the defendants is to enforce a transfer made in 1991. To add to this is the defendants' contention that the transfer itself is an acknowledgement in writing of the debt. When the alleged defalcations took place and much was purloined does not, in the context, appear to be relevant.

In the last analysis, we felt that it should have been manifestly obvious that the order sought to be appealed against was purely interlocutory. The parties were therefore completely at liberty to put their pleadings in proper order and to ventilate the issue as to whether the counterclaim was time-barred at the trial of the action in the court below.

We are, consequently, of the view that the application was an exercise in futility and had properly been dismissed with costs.

28 August 1995

VC George JCA: I have the benefit of reading the judgment of my brother, Mahadev Shankar JCA. For the reasons given therein, I agree that the application should be dismissed with costs.

Application dismissed.

Reported by Azra Azman